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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

No. 92-9059

JONATHAN DALE SIMMONS,

Petitioner,

v.

SOUTH CAROLINA,

Respondent

On Petition for Writ of Certiorari
To the Supreme Court of South Carolina

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT IN REPLY

1. The significance of denials of certiorari in other cases.

Ignoring the settled principle that "a denial of a petition for certiorari has no significance as a ruling," Parker v. Ellis, 362 U.S. 574, 576 (1959), and "does not imply approval of the decision for which review is sought. . . ." Elgin, Joliet and Eastern Ry. Co. v. Gibson, 355 U.S. 897 (1957) (memorandum of Frankfurter, J.)., respondent argues that this petition should be denied because the Court has declined to take up similar claims in the past. Brief in Opposition at 11-12. Even if it were accurate, respondent's claim that the issue presented in this case has been rejected for consideration in prior cases would mean little. Compare, e.g., Cage v. Louisiana, 498 U.S. 39 (1991) (denying certiorari to review state court's conclusion that unconstitutional instruction on reasonable doubt could be disregarded as harmless), with Sullivan v. Louisiana, 113 S.Ct. 373 (1992) (granting certiorari to consider identical question), and id., 113 S.Ct. 2078 (1993) (unanimously reversing state court's judgment on harmless error question). In any event, most of the cases which respondent cites as having presented the claim advanced in this case are distinguishable, since they either involved claims that defendants were constitutionally entitled to question prospective jurors about their views on parole during voir dire examination, see e.g., King v. Lynaugh, 850 F.2d 1055 (5th Cir.), cert. denied, 488 U.S. 1019 (1988), State v. McNeil, 324 N.C. 33, 375 S.E.2d 909 (1989), or

else did not involve statutory provisions for life imprisonment without parole, Peterson v. Murray, 904 F.2d 882 (4th Cir. 1992) (20-year parole eligibility), Jenkins v. Commonwealth, 244 Va. 445, 433 S.E.2d 360, 369 (1992), cert. denied, 113 S.Ct. 1862 (1993) (30-year parole eligibility), or both. King, supra; McNeil, supra.

2. Recent statutory changes have increased the already overwhelming support of state courts and legislatures for the result urged by petitioner.

Respondent appears to acknowledge the accuracy of petitioner's survey of the practices of other death penalty jurisdictions with life-without-parole alternatives, but offers a vague objection to his characterization of what the survey shows. Brief in Opposition at 15-16. Specifically, respondent seeks to exclude from petitioner's list of "truth-in-sentencing" jurisdictions four states (Maryland, Nevada, Oklahoma and Oregon) which offer the jury a choice between parole-eligible and parole-ineligible life sentences. Although respondent insists that these jurisdictions "are clearly not similar to the South Carolina situation," id., they are similar in the only respect relevant to this case. Like the nine states in which the jury's sentencing verdict forms themselves inform the jury of the defendant's parole ineligibility, see Pet. for Cert. at 37 n. 21, and like the three additional states which mandate specific jury instructions on the unavailability of parole, id., at 38 n. 22, these four states ensure that each capital sentencing jury is accurately apprised,

when it makes its life-or-death decision, of whether the particular defendant before it will be ineligible for parole if sentenced to life imprisonment.

Moreover, during their 1993 legislative sessions, three more states--Georgia, Indiana, and Tennessee--have joined Maryland, Nevada, Oklahoma and Oregon in permitting capital juries to select life without possibility of parole as one of several sentencing alternatives to the death penalty. As revised by 1993 Georgia Act 569, Ga. Code § 17-10-31.1(a) now provides that the jury must select between binding sentencing alternatives of death, life imprisonment without parole, and parole-eligible life imprisonment.[1] Likewise, Indiana capital sentencing juries are now required to recommend to the court whether "the death penalty or life imprisonment without parole, or neither, should be imposed." 1993 Ind. Act 250, 1993 Ind. Legis. Serv. 250 (West). Finally,

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[1]This statutory change effectively overrules Potts v. State, 296 Ga. 376 S.E.2d 851 (1989), which respondent has cited in its brief. The Georgia legislature's action also ensures that future Georgia juries will not be subject, as have so many in the past, to the capricious effects of misinformation and speculation concerning the practical effect of a sentencing verdict other than death. See J. Mark Lane, "Is There Life Without Parole?": A Capital Defendant's Right to a Meaningful Alternative Sentence, 26 Loy. L.A. L. Rev. 327, 368-90 (1993) (documenting 70 instances of jury inquiries about parole eligibility in post-Furman Georgia trials which ended in death sentences); id., 391-393 (excerpts from 10 post-trial juror interviews in one Georgia capital case demonstrating actual impact of juror speculation about parole eligibility); Anthony Paduano & Clive Stafford Smith, Deadly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty, 18 Columbia Human Rights L. Rev. 211 (1987) (detailing history and documenting effects of Georgia's prior rule against allaying jurors' concerns about parole).

this year's amendment to Tennessee's capital sentencing procedures creates two sentencing alternatives to the death penalty--life without possibility of parole, and life without parole for at least 25 years--and requires that the jury choose between these three alternatives after being clearly instructed by the trial judge "that a defendant who receives a sentence of imprisonment for life without possibility of parole shall never be eligible for release on parole." 1993 Tenn. Pub. Acts 473, § 4.

As a result of these statutory changes, the total number of capital punishment jurisdictions which inform sentencing juries of the existence and availability a life-without-parole alternative to the death penalty now stands at 19, while only three states--Pennsylvania, South Carolina and Virginia--refuse to require or allow that juries be told of the no-parole sentencing alternative. Petitioner realizes that even such "near universal" views of state courts and legislatures do not, by themselves, establish the unconstitutionality of contrary positions. Beck v. Alabama, 447 U.S. 625, 636-3 (1980). But the fact that so many capital punishment states which employ life-without-parole alternatives have now acknowledged the practical importance of providing sentencing juries with the fact of the defendant's ineligibility for parole certainly supports petitioner's claim concerning the crucial importance of the information, and the value of the right which he seeks to assert. Id.

3. Respondent has inverted the *Boyde* standard for assessing the constitutionality of the trial court's jury instruction

Respondent also argues, invoking Boyde v. California, 494 U.S. 970 (1990), that "it is reasonably likely" that the jury interpreted the trial judge's supplemental parole instruction--that the jury should not consider parole, and that the term "life imprisonment" was to be understood in its "plain and ordinary meaning"--as signifying that petitioner would never be eligible for parole. This misstates the governing constitutional standard. Boyde requires that a reviewing court determine "whether there is a reasonable likelihood that the jury has applied the challenged instruction" in a way that violates the constitution. 494 U.S. at 380. The Boyde Court expressly stated that under this standard, "a defendant need not establish that the jury was more likely than not to have been impermissibly [influenced] by the instruction." Id. (emphasis added). Thus the mere existence of a reasonable likelihood that the jury's interpretation of the supplemental parole instructions in this case coincided with that of the state supreme court falls far short of establishing that petitioner's constitutional rights were protected. The constitutionally relevant question under Boyde is whether there exists any reasonable likelihood that the jury's misplaced concerns about petitioner's parole eligibility survived the trial judge's needlessly evasive response. The record as a whole and the swiftness with which a death verdict followed the instruction both

establish that such a reasonable likelihood does exist.

Respondent's emphasis on the trial judge's admonition not to consider parole is unavailing. As petitioner has already pointed out, Pet. for Cert. at 16 n. 13, the South Carolina courts have themselves recognized the ineffectiveness of this instruction.[2] While cautionary instructions are normally adequate to safeguard the rights of the accused, "there are there some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." Bruton v. United States, 391 U.S. 123, 135 (1968). This is surely such a case. And where the state court could so easily have removed the need for a cautionary instruction simply by telling the jury the truth about petitioner's ineligibility for parole, its refusal to do so is constitutionally intolerable.[3]

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[2]Parenthetically, petitioner would note that a detailed discussion of South Carolina's treatment of parole in capital sentencing proceedings which was cited in pre-publication form in the petition for certiorari has now been published. James M. Hughes, Note: Informing South Carolina Juries About Parole, 44 S.C. L. Rev. 383 (1993).

[3]Petitioner does not suggest that an instruction not to consider parole would be constitutionally suspect in any jurisdiction which actually did authorize parole for convicted capital murderers. See, Johnson v. Texas, No. 92-5653 (June 24, 1993) (noting that jury was instructed "not to consider or discuss the possibility of parole"). Where parole is a real possibility for a murderer who has been spared the death penalty (as it is in Texas, for example), cautionary instructions remain the only way to provide any protection to the defendant without affirmatively misleading the jury. Petitioner's claim is limited to the handful

4. Respondent's attempt to minimize the practical effect of petitioner's ineligibility for parole does not lessen the unfairness of what happened here.

Respondent stresses that the attorney for the South Carolina Department of Corrections could not assure the trial court that petitioner "would always remain behind bars," since South Carolina has no statute (as opposed to regulation) prohibiting furloughs or work-release for life-without-parole inmates. Brief in Opposition at 5. The state also argues that petitioner "could be pardoned at any time under extraordinary circumstances," (although the state's brief contains no suggestion that this has ever occurred in the modern history of South Carolina), id. at 14, and that "inmates do infrequently escape from confinement . . . and commit brutal crimes." Id., at 16. The state does not dispute petitioner's observation that South Carolina is unusually restrictive in its treatment of life-without-parole inmates, inasmuch as it does not authorize gubernatorial commutation of such sentences, and in general the state's argument appears to amount to little more than an assertion of the truism that no one can predict the future with absolute certainty. It is a sufficient answer to arguments of this sort that the constitutional principles of Lockett, Gardner and Beck do not require, as a prerequisite to admission of information militating against imposition of the death penalty, that the

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of jurisdictions which have eliminated parole entirely for some or all life-sentenced capital murderers, but which refuse to inform capital sentencing juries of that fact.

information be absolutely and irrebuttably dispositive of the point in contention. Petitioner does not dispute the right of the prosecution to show that petitioner could still pose a danger to society even if sentenced to life without possibility of parole. California v. Ramos, 463 U.S. 992 (1983). All he sought at trial was a fair chance to inform the jury of the most crucial single fact weighing in his favor on that issue.

The evidence supporting petitioner's view of the practical importance of parole as an issue in capital sentencing continues to grow. One especially striking finding, reported in a recently-published article, shows that the sentencing decisions of capital juries correlates with the jurors' predictions concerning the actual effective length of "life" sentences for murder. William J. Bowers, Capital Punishment & Contemporary Values: People's Misgivings and the Court's Misperceptions, 27 Law & Soc. Rev. 157, 169-70 (1993). Using post-trial juror interview data from California, Florida and South Carolina, Bowers found that

> [i]n each of these three states, believing that convicted first-degree murderers would get out sooner is associated with voting for death. Notably, the relationship between belief in early release and voting for death is more pronounced as fewer jurors in the state appear to know what the mandatory minimum sentence is. Thus the difference is least evident in California, where a third of the jurors appear to know that life without parole is the sentence that will be imposed in lieu of death, and most pronounced in South Carolina where fewer than 15% appear to know the mandatory minimum.

Id. (emphasis added). The significance of Bowers' South Carolina juror interviews is all the greater in this case, since the

"mandatory minimum" to which he referred was 30 years--the term which must be served prior to parole eligibility by convicted capital murderers who, unlike petitioner, have no prior convictions for violent offenses. S.C. Code Ann. § 16-3-20(A) (1992 Supp.). Bowers' data reveals that of 114 actual South Carolina capital jurors interviewed, only a negligible number--3.7 percent--understood a life sentence to mean (as it did in petitioner's case) life without parole. Id., Table 6. This provides powerful corroboration for the findings of petitioner's statewide public opinion survey, admitted into evidence in the trial court, which showed that almost no jury-eligible South Carolinians understood the "plain meaning" of life imprisonment to be life without parole, and that defendants' parole-eligibility (real or imagined) would weigh heavily in most jurors' sentencing decisions.

In Skipper v. South Carolina, 476 U.S. 1 (1986), respondent argued that the likely good behavior of a convicted murderer in a prison setting was "irrelevant" to the jury's sentencing decision, and that evidence bearing on that issue could be excluded from capital sentencing hearings despite the rule of Lockett v. Ohio, 438 U.S. 586 (1978). This Court, of course, held otherwise. Respondent now candidly admits that "[w]hile we may agree that an individual's future adaptability to prison may be more speculative than parole ineligibility," such ineligibility nevertheless "does not create a relevant mitigating circumstance under Skipper." Brief in Opposition at 17. Respondent's concession that the

excluded factor here is "less speculative" than was the excluded factor in Skipper effectively forecloses South Carolina's effort to distinguish Skipper. Like the rule struck down in Skipper, South Carolina's decision to conceal from capital sentencing juries its own judgment that defendants like petitioner are never to be paroled justifies review by this Court.